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No. 88-301

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

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ZORA S. GILL, M.D.,

Petitioner,

v.

MERCY HOSPITAL AND THE MEDICAL STAFF OF MERCY HOSPITAL,

Respondents.

—o—

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

—o—

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CALIFORNIA

STATUTE

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STATEMENT OF THE CASE

Respondent, Mercy Hospital, is a private hospital located in Bakersfield, California. Petitioner is a member of Respondent's Medical Staff with privileges to perform certain general and vascular surgical procedures. This dispute involves the Hospital's decision, based on the recommendation of its Medical Staff, to deny Petitioner's request for privileges to perform certain additional surgical procedures which Petitioner had performed on a provisional basis.

Petitioner was appointed to the Provisional category of Hospital's Medical Staff on October 25, 1983. As a provisional member, he was subject to formal monitoring of his performance in all of his surgical procedures. Under Hospital's medical staff bylaws, Petitioner was required to demonstrate sufficient proficiency in all requested surgical procedures to advance to unmonitored status within two years.

In 1985, the Medical Staff's surgical control and medical executive committees recommended that Petitioner be granted unmonitored status to perform some procedures,[1] but that his privileges to perform other procedures be terminated.

Petitioner requested and was given a full, evidentiary hearing before a medical peer review committee to review the denial of certain privileges. The hearing process complied in all respects with both Hospital bylaws and appli-

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1. These were hernia repair, appendectomy, skin biopsy, pilonidal cyst, routine gallbladders and arteriovenous shunts and arteriovenous fistulas performed in an extremity for access.

cable California law. Prior to the hearing, Petitioner received detailed notice of the deficiencies which had been observed in his surgical practice together with copies of all critical monitor reports and copies of all applicable patient records. At the hearing, which was conducted on April 1, 1986, Petitioner was represented by a physician advocate of his choice.[2] He confronted and examined witnesses against him and presented evidence in his behalf. The hearing was conducted before a panel of physicians who had had no prior involvement in the matter.

Following the hearing, the peer review committee upheld the surgical and executive committees' recommendation. This decision was based on a detailed review of thirteen cases and on the expert opinion of his monitors and of a hospital-based radiologist. The committee concluded that Petitioner had demonstrated poor medical judgment and poor surgical technique in several more complicated surgical cases. Among other problems he had incorrectly sized a femoral-femoral artery graft; he had used poor surgical technique in performing a vascular access graft which failed in a short time; he improperly tied a knot inside an already occluded artery (which the monitor required him to remove); he handled tissue roughly and broke through a portion of a vein graft; he had a "noticeable tremor" while placing an anastomosis which leaked enough to require additional suturing; his monitor had to intervene to prevent him from performing a complicated gallbladder operation

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2. Under California law and the applicable bylaws, Petitioner was not entitled to be represented at the peer review hearing by legal counsel. He was represented by legal counsel, however, at the extensive appellate review of the matter before the Hospital's Board of Directors.

when preoperative tests showed that the involved tissue would not have stood the procedure; he repeatedly used poor suturing technique; he performed an unnecessary appendectomy during an unrelated procedure despite risk of infection due to cecal contamination; he failed either to order imaging studies or to proceed expeditiously to surgery to save a young spleen-injury victim who was in serious danger of bleeding to death; he scheduled a hernia operation for a patient whose medical condition was too serious for that procedure; and he mismanaged a patient's postsurgical complication.

Following an extensive appellate review hearing before the Hospital's Board, at which Petitioner was represented by legal counsel, the Board upheld the Medical Staff's recommendation. Petitioner then filed a Petition for Writ of Mandate in Kern County Superior Court, seeking to overturn the Hospital's decision. That Petition was denied by order dated December 23, 1986. Petitioner appealed the denial and his appeal was denied by the California Court of Appeal on March 1, 1988. The California Supreme Court denied Petitioner's Petition for review.

SUMMARY OF ARGUMENT

Petitioner's claims are based on the assumption that medical peer review actions by *private* California hospitals constitute State Action because California requires hospitals to conduct peer review and to report adverse peer review actions to the State medical board. This assumption is false. Federal courts has consistently held that peer

review by private hospitals is not State Action. Moreover, peer review actions by private California hospitals cannot be State Action, since no state entity or official controls the substantive decisions. Such actions are made by private individuals on the basis of professional standards which are not established by the State. They cannot fairly be attributed to the State.

The process applied to Petitioner was fair and complied in all respects with applicable bylaws and a well-developed body of California law which has not been affected by the Health Care Quality Improvement Act, 42 U.S.C. 11111, *et seq.*

ARGUMENT

I. No Issue Raised by This Petition Warrants Exercise of the Court's Discretion to Grant Certiorari

This is neither a case in which a state court of last resort has "decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals" (Supreme Court Rule 17.1(b)), nor a case in which a state court "has decided an important question of federal law [which] should be settled by this Court, or [which] has decided a federal question in any way in conflict with applicable decisions of this Court" (Supreme Court Rule 17.1(c)).

Of course the California Court of Appeal is not a state court of last resort. Even if it were, its decision in this case is fully consistent with every federal and state court

which has considered the question of whether peer review decisions by private hospitals constitutes Fourteenth Amendment State Action. No court has ever held that private hospital peer review decisions constitute State Action. To the contrary, seven Circuit Courts of Appeal have rejected that proposition. *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427 (2nd Cir. 1977); *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3rd Cir. 1978); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975); *Madry v. Sorel*, 558 F.2d 303 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987); *Musso v. Suriano*, 586 F.2d 59 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976); *Watkins v. Mercy Hospital Center*, 520 F.2d 894 (9th Cir. 1975); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); *Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306 (10th Cir. 1983).

Since the inapplicability of Fourteenth Amendment State Action to private peer review is so well established, no issue raised by this Petition is of enough importance to warrant this Court's resolution. Moreover, as is discussed below, the decision in this case is fully consistent with this Court's analysis in both *Patrick v. Burget*, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988) and *Blum v. Yaretsky*, 457 U.S. 991, 73 L.Ed.2d 534, 102 S.Ct. 2777 (1982).

II. Peer Review Actions by Private California Hospitals Do Not Constitute Fourteenth Amendment State Action

Petitioner asserts, without citation of any authority, that private hospital peer review actions in California

must constitute State Action under the Fourteenth Amendment, because California licensure regulations and liability standards require private hospitals to monitor and appropriately limit the clinical privileges of Medical Staff members and because adverse peer review actions must be reported to the state medical board.

That assertion is flatly inconsistent with this Court's State Action analysis as stated in *Blum, supra.* There the State of New York, through Medicaid regulations required private physicians to use a prescribed form to certify the medical necessity of skilled nursing facility ("SNF") care for Medicaid patients. It also required private SNFs to complete and submit patient assessment forms, to operate utilization review committees ("URCs") and to discharge or transfer patients whose continued stay was inappropriate. Facilities which failed to do so were subject to fines.

Medicaid patients subject to transfer or discharge claimed that the URC decisions were State Action and that they were entitled to due process hearings prior to transfer or discharge. This Court rejected that claim, however, ruling that although the state had required URC decisions to be made and reported, it had not exercised direct control over the substantive decisions themselves. "Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." 457 U.S. at 1009. The "regulations themselves do not dictate the decision to discharge or transfer in a particular case." 457 U.S. at 1010. And, "although federal law requires state officials to review these assessments [citation omitted] nothing in the

regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients. . . ." *Id.*

Likewise, California licensure and reporting regulations may require hospitals to conduct peer review and to report the results, but it is *private* rather than *state* actors who decide whether or not to approve particular clinical privileges for particular physicians. Those decisions also "turn on medical judgments made by private parties according to professional standards which are not established by the State." It cannot, therefore, "be said that the State is responsible for the specific conduct of which [Petitioner] complains." 457 U.S. at 1004.

In its recent decision in *Patrick, supra,* this Court adopted a consistent analysis to determine whether the State of Oregon had exercised sufficient active supervision over private peer review actions to protect them from federal antitrust scrutiny. Although Oregon required private hospitals to conduct peer review, to limit clinical privileges as appropriate and to report limitations to the state medical board, no state agency exercised power actually to control the individual decisions. Private peer review actions were, therefore, not State action under the doctrine of *Parker v. Brown,* 317 U.S. 341, 83 S.Ct. 307, 87 L.Ed. 315 (1943).

In so ruling, this Court again recognized that private medical peer review actions do not become transformed into the action of states just because states require peer review to be done and require the results to be reported.

III. The Federal Health Care Quality Improvement Act Has No Applicability To This Case

Petitioner claims that the procedural safeguards which ought to have applied to his hearing before Hospital's medical staff are affected by the reporting and limited immunity provisions of the federal Health Care Quality Improvement Act of 1986, 42 U.S.C. Sections 11111, *et seq.* ("HCQIA").

That claim simply cannot be made in good faith. HCQIA was not enacted until October 17, 1986, over six months *after* Respondent's Medical Staff hearing, and its peer review reporting provisions have not yet been implemented. HCQIA simply has not and will not apply in any way to this peer review action.

Moreover, HCQIA does not, as Petitioner suggests, reflect a Congressional policy to modify state peer review procedural requirements in effect at the time HCQIA was adopted.

In order to qualify for immunity under HCQIA, a professional review action must, *inter alia*, be taken "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances. . . ." 42 U.S.C. Section 11112(a)(3). Peer review actions are presumed to qualify for immunity "unless the presumption is rebutted by a preponderance of the evidence."

Congress established two ways for a professional review entity to comply with the "adequate notice and hearing" requirement. One is simply to follow the existing state law applicable to such hearings; the other is to follow

a set of procedural steps, set forth in Section 11112(b) of the Act, which constitute a procedural "safe harbor." Section 11112(b) makes it clear that a "professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the [fair notice and hearing requirement]."

The alternative nature of the notice and hearing provisions was described in the House Report on H.R. 5540 (the Bill which was adopted as the Act):

> "If the procedures specified in that subsection are not precisely of the character spelled out in subsection [11112(b)], the test of 'adequacy' may still be met under other prevailing law. The Committee is aware, for example, that some courts have already carefully spelled out the different requirements for certain professional review activities or actions, such as procedures regarding applicants for privileges at a hospital. In those situations, compliance with applicable law should satisfy the 'adequacy' requirement even where such activities or actions require different or fewer rights than the ones specified under subsection [11112(b)]." Report of the House of Representatives, Committee on Energy and Commerce on the Healthcare Quality Improvement Act of 1986, Rpt. No. 99-903, pp. 10-11.

The "safe harbor" rights specified under subsection 11112(b) include the physician's right, at the hearing, to be "represented by an attorney or other person of the physician's choice."

On the day the Act was passed, California Congressman, Henry Waxman, reiterated that the provisions of subsection 11112(b) are not intended to change existing law governing peer review hearings:

> "Those who have raised the due process objections have obviously misconstrued the effect of Section [11112(b)] which states that a professional review board's failure to meet the adequate due process provisions set forth in the bill shall not, in itself, constitute the failure to meet adequate due process for purposes of obtaining immunity. A simple reading of this language reveals that it does nothing whatsoever to lessen a physician's due process rights. As carefully explained in the report accompanying H.R. 5540, this language simply means that those who choose to rely on current law—rather than the specific provisions of H.R. 5540 regarding due process may do so." *Congressional Record,* October 17, 1987, p. H 11591.

So, far from upsetting existing California law on medical staff hearings, the Act allows hospitals to continue to follow existing law.

IV. The Process Applied To Petitioner Was Fair And Complied With Applicable State Law

As is detailed in the Court of Appeal decision appended to the Petition, California courts have carefully defined the elements of "fair procedure" which must attend medical peer review actions. Each of the procedural arguments which Petitioner advances here is dealt with appropriately in the California Court of Appeal decision.

V. The California Administrative Mandate Statute Does Not Violate The Equal Protection Clause

Petitioner argues that the California Administrative Mandate statute, Section 1094.5 of the California Code of Civil Procedure, violates the Equal Protection Clause by adopting a less stringent standard of judicial review for peer review actions by private hospitals than for public

hospitals. In support of this argument, Petitioner misquotes the section in point. The version of Section 1094.5 (d) quoted at page 22 of the Petition is out of date. The current Section 1094(d), which is reprinted correctly in Appendix G-1 of the Petition, specifies that the same standard of judicial review applies to private and public district hospitals.

VI. The Petition Violates Supreme Court Rule 21.4 And, Therefore, Should Not Have Been Received And Filed

Appendix B to the Petition is a letter brief by the California Medical Association. It was used in Petitioner's unsuccessful attempt to obtain review by the California Supreme Court. Its inclusion in the Petition can be for no purpose other than to support the Petition. As such, it directly violates Rule 21.4 and disqualifies the Petition from being received or filed.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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